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No. 89-785

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALAMO BANK OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a state bank that is the survivor of a merger between a national bank and a state bank is responsible for pre-merger criminal violations of the Bank Secrecy Act, 31 U.S.C. 5313 and 5322(b), that were committed by the national bank prior to the merger.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is reported at 880 F.2d 828. The opinion of the district court (Pet. App. 8a-15a) is reported at 705 F. Supp. 336.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1989. A petition for rehearing was denied on September 14, 1989. Pet. App. A1. The petition for a writ of certiorari was filed on November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 11, 1987, the Boards of Directors of petitioner Alamo Bank of Texas (Alamo), a state-chartered

bank, and Central National Bank (CNB), a federally chartered bank owned by the same holding company as Alamo, approved a plan providing for the merger of the two banks under the title and charter of Alamo. Under the plan, CNB became a branch of Alamo on April 1, 1987, and two days later CNB surrendered its charter to the Office of the Comptroller of the Currency. Pet. App. 10a.

Prior to the merger, between February 14, 1983, and April 2, 1984, CNB had committed seven violations of the Bank Secrecy Act, 31 U.S.C. 5313, by failing to report substantial cash transactions. Pet. App. 10a. Following the merger, on December 17, 1987, Alamo was indicted on seven counts of violating the reporting requirements, 31 U.S.C. 5322(b), and one count of conspiracy to violate the reporting requirement, 18 U.S.C. 371. Pet. App. 9a.

Alamo moved to dismiss the indictment on the ground that it could not be held criminally responsible for CNB's pre-merger conduct. Pet. App. 10a. The district court denied the motion. After finding that Texas law controls the issue of successor liability because Alamo operated under a state charter (Pet. App. 11a), the court held that the Texas statute governing bank mergers imposes criminal liability on a surviving bank for the criminal conduct of one of its pre-merger constituents. Pet. App. 11a-13a. Following the court's ruling, Alamo entered a conditional plea of nolo contendere to three counts of failing to file currency transaction reports, preserving its right to appeal the question whether it could be held criminally responsible for CNB's pre-merger conduct. Alamo was assessed a fine of $750,000, of which $500,000 was suspended in favor of 36 months' probation. Pet. App. 4a.

The court of appeals affirmed the conviction. The court disagreed with the district court's conclusion that the issue of "flow-through" liability was governed by state law. Pet.

App. 6a. The court found that the case is controlled by a section of the Bank Merger Act, 12 U.S.C. 214b, which provides that, after the merger of a national bank into a state bank, "the resulting State bank shall be considered the same business and corporate entity as the national banking association." Under Section 214b, "CNB continues to exist, albeit now as part of Alamo. * * * Alamo is CNB, and it is CNB now named Alamo which is responsible for CNB's actions and liabilities." Pet. App. 6a.

ARGUMENT

Although the district court and the court of appeals disagreed concerning whether state law or federal law controls the issue of flow-through liability in this case, both courts were in agreement that CNB is not immunized from the consequences of its criminal conduct by the fact that it merged into, and therefore now operates under the name and charter of, Alamo Bank of Texas. This result is compelled by the clear language of both federal and state statutes, as well as by the policy considerations noted by this Court in *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271, 274 (1959).

1. Petitioner's primary argument is that the result reached by the court of appeals would "have substantial adverse effects on the federal agencies with regulatory control over banking, the industry, and the public treasury." Pet. 5. According to petitioner, imposing flow-through liability will raise the cost to the government of resolving current problems in the banking industry.[1] Because potential acquirers of failing banks will, it is claimed, lower

[1] Although petitioner refers to problems of the savings and loan industry as well, Pet. 5, the statute relied upon by the court of appeals, 12 U.S.C. 214(b), applies only to "national banking associations," see 12 U.S.C. 21, not to savings and loan institutions.

their bids out of fear that any acquisition will bring with it unknown criminal liabilities, the government will be forced to spend additional funds to cover the losses of failing banks. Pet. 5-9.

Petitioner's argument is addressed to the wrong forum. The provision of the Bank Merger Act that the court of appeals found to control this case was enacted in 1950, long before the banking industry faced its current difficulties. Act of Aug. 17, 1950, ch. 729, § 2(b), 64 Stat. 456. Even if the economic and factual assumptions underlying petitioner's argument were sound,[2] the Congress that enacted the statute could not have taken them into account in determining the status of a national bank that merged into a state bank. Thus, although petitioner may believe that the government exercised its prosecutorial discretion unwisely in this case, or that Congress ought to have amended the Bank Merger Act to confront the problems raised by petitioner, those claims are appropriately addressed to the Executive Branch and Congress, not to this Court.

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[2] Among the assumptions on which petitioner's argument is based are that potential acquirers of failing banks would have no way to determine whether a potential merger partner had unknown criminal liabilities and that the marketplace would discount the price of banks more than the value of the fines that will be recovered through criminal prosecution. In addition, petitioner's argument appears to rest on the assumption that compliance with the currency reporting requirements would not suffer if a bank knew that it could rid itself of liability for violations by merging into another bank. For if compliance would suffer, that too is a cost that would have to be weighed in the economic calculus. Finally, it is not clear why potential criminal liability would prove a greater deterrent to a purchaser than potential tort or other liabilities that may be equally large and equally unknown at the time of purchase. Hence, petitioner's assumptions are subject to substantial dispute, and they cannot in any event justify ignoring the plain language of the Bank Merger Act.

2. Petitioner also bases a number of arguments on the proposition that, because it "had no knowledge of [CNB]'s transgressions," the harsh sanctions of the criminal law ought not to be applied to it. Pet. 11-14. As the court of appeals recognized, however, the question in this case is not whether petitioner as an entirely innocent entity is being prosecuted for wrongs committed by another. It is, rather, whether CNB continues to exist—albeit under the name of Alamo—and therefore ought to suffer the consequences of its willful violation of the currency reporting requirements. Because whatever benefit the merged bank gained from its criminal conduct flowed through to the surviving entity, and because the deterrent purposes of corporate criminal liability could be substantially weakened if a corporation could extinguish liability for its criminal conduct through a change in corporate form, it is not surprising that both federal and Texas statutes governing bank mergers provide that the merged bank continues to exist in a new form and must pay the penalty for its criminal conduct.[3]

Neither of the canons of construction advanced by petitioner—the rule of lenity and the need for clear definition of criminal conduct—render doubtful the result reached

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[3] The imposition of liability is particularly apt in this case, because CNB and Alamo were owned by the same holding company. Pet. 3 n.1. The merger of the two banks was dictated by a single entity, which would have found a convenient means to rid itself of the costs of criminal conduct if the courts below had refused to impose successor liability on Alamo. Although petitioner correctly notes that the government took the position below that the issue in this case does not "turn on who owned the pre-merger banks or the resulting bank," see Pet. 4 n.2, petitioner incorrectly states that the government attributed no "significance" to the common ownership. *Ibid.* To the contrary, the government recognized in the very footnote cited by petitioner that "ownership is not of primary relevance, although it may be of secondary importance as the * * * owner [of both CNB and Alamo] will be impacted by the fine." See C.A. Br. 3 n.1.

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by both courts below. The rule of lenity applies only where a statute is genuinely ambiguous. See, *e.g.*, *Perrin* v. *United States*, 444 U.S. 37, 49 n.13 (1980); *United States* v. *Culbert*, 435 U.S. 371, 379 (1978). In this case, neither court found any ambiguity in the federal or state statutes they construed. Similarly, although *Dowling* v. *United States*, 473 U.S. 207, 213 (1985), referred to the need for restraint in determining "the scope of the conduct [that a criminal statute] forbids," there is no dispute in this case concerning what conduct is forbidden under 31 U.S.C. 5313 and 5322(b).

3. The possibility of criminal liability for successor corporations—particular where the successor was a product of merger—has long been an accepted feature of the legal landscape. See, e.g., *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271 (1959); *United States* v. *Mobile Materials, Inc.*, 776 F.2d 1476 (10th Cir. 1985); *United States* v. *Polizzi*, 500 F.2d 856 (9th Cir.), cert. denied, 419 U.S. 1120 (1975); *Alamo Fence Co.* v. *United States*, 240 F.2d 179 (5th Cir. 1957); *United States* v. *P.F. Collier & Son Corp.*, 208 F.2d 936 (7th Cir. 1953); *United States* v. *Arcos Corp.*, 234 F. Supp. 355 (N.D. Ohio 1964); *United States* v. *Anaconda American Brass Co.*, 210 F. Supp. 873 (D. Conn. 1962); *United States* v. *Maryland and Virginia Milk Producers*, 145 F. Supp. 374 (D.D.C. 1956); *United States* v. *Cigarette Merchandisers*, 136 F. Supp. 214 (S.D.N.Y. 1955). Because the decision below is simply another in a long line of cases reaching similar results, and because petitioner cites no authority from any court that conflicts with the result reached below, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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